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No. 521

In the Supreme Court of the United States

OCTOBER TERM 1969

GUIDO FIDANZI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Guido Fidanzi, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

Judgment and Opinion of the Court Below

On June 23, 1969, the Court of Appeals for the Seventh Circuit affirmed the judgment of conviction entered by the United States District Court for the Northern District of Illinois after a jury trial. The first count of the indictment against appellant charged him with evading a tax of $1,027.51 by understating his taxable income by $5,000 for the year 1961 (Sec. 7201, Title 26 U. S. Code). The other three counts of the indictment charged appellant with failing to file income tax returns in 1963, 1964 and 1965 (Sec. 7203, Title 26 U. S. Code).

The opinion of the Court of Appeals is not yet reported; it is printed herewith as Appendix "A".

A timely Petition for Rehearing was denied on July 29, 1969, without a written opinion.

Jurisdictional Statement

The jurisdiction of this court is invoked under Title 28, U.S.C. Section 1254(1).

Question Presented for Review

1. May the prosecutor attack the character of the defendant in a prosecution for income tax evasion by referring to him as a con-man, swindler, and extortionist when the defendant does not testify and his character is not an issue in the case?

Statutes Involved

Title 26, Sections 7201 and 7203 are set out in Appendix B.

Statement of the Case

Evidence of the Government

A search of the records of the Chicago District of the Internal Revenue Service made by the Supervisor of files showed that Guido and Thelma Fidanzi filed an income tax return for the year 1961. No returns were filed by Guido Fidanzi for the years 1963, 1964, and 1965 (Tr. 14-19).

Testimony of Edward H. Goetz

Edward H. Goetz testified that in November, 1965, he was introduced to the defendant by Al Cioffi at Blue Island. The defendant was known to him as Sammy (Tr. 22).

The defendant told Goetz that Cioffi had made a deal to buy 40 television sets at $200 apiece. Goetz said that he wanted to purchase three or four sets (Tr. 25). The defendant said that Goetz would have to come up with $8,000 to purchase all of the sets because the deal had been made (Tr. 26).

The next day Goetz spoke to the defendant by telephone and conceded to purchase half of the sets for $4,000 (Tr. 30). That same day Goetz cashed a check for $4,000 and gave this amount in cash to the defendant (Tr. 31-34). The following day Goetz received a telephone call from the defendant who told Goetz that "they" needed the full $8,000 before the television sets would be released (Tr. 35-36). The defendant told Goetz that if he did not come up with the additional $4,000, he could forget about the first $4,000 (Tr. 36).

Shortly thereafter, Goetz met the defendant and gave him $4,000 in cash. Goetz never received any television sets, nor was any of his $8,000 returned (Tr. 40-41).

Testimony of Ronald Redmon

Donald Redmon testified that on a morning in July, 1965, he received a telephone call from a man named Jerry who asked if he was interested in buying some liquor. An hour later he met Jerry, whom he identified as the defendant, Guido Fidanzi (Tr. 78-83). The defendant told Redmon that he was making the deal on the liquor and that Redmon would need $1,000 to purchase fifty cases of liquor (Tr. 84).

The defendant told Redmon to give the $1,000 in cash to their mutual acquaintance, Jerry Schnadenburg, that evening, which Redmon did (Tr. 85). Three days later the defendant called Redmon and told him that he could not break up the shipment and that Redmon would have to come up with another $1,000 and buy the entire shipment (Tr. 86). The defendant said that he had Redmon's thousand dollars and the whiskey and that Redmon would not get either unless he purchased the whole hundred cases (Tr. 87).

A few days after that the defendant called Redmon and Redmon told the defendant that could not come up with the money. Redmon never obtained either the liquor or his $1,000 (Tr. 88).

Testimony of Clarence Pensgard

Clarence Pensgard testified that in 1963, he was a real estate salesman and a representative of the Aladdin Oil Company of Springfield, Illinois (Tr. 100-101). In September, 1963, Pensgard was introduced to the defendant, who used the name John Areleo (Tr. 102).

Pensgard told the defendant that Aladdin was in the process of obtaining investors to drill four wells in areas near Springfield (Tr. 103). The next day the defendant called Pensgard and said that Mr. O'Brien, the owner of Agar Packing Company, was interested in investing, but that the defendant wanted an $8,000 commission before the

deal was made (Tr. 105). After checking with his employer, Pensgard agreed to the arrangement suggested by the defendant (Tr. 105-106).

Pensgard told the defendant that he could raise $4,000 and would give him a check. The defendant said that he would not accept a check and would have to have cash (Tr. 107). Pensgard met the defendant and Charles Pine and gave the defendant the $4,000, ". . . with the understanding that if the deal does not go through, this $4,000 is to come back." (Tr. 111). The defendant then said that he would bring O'Brien to Pensgard's house the next day (Tr. 111).

One or two days later the defendant, Charles Pine, and Edwin T. O'Brien came to Pensgard's house. Pensgard made a full presentation to O'Brien who said that he was interested and would be in touch with Pensgard shortly (Tr. 112-113). An hour after O'Brien left, the defendant called Pensgard and said that the attorney would have to have his $4,000 or else the deal was off (Tr. 114).

Pensgard called his employer and then spoke with the defendant again, telling him that he would arrange to get him $4,000 more (Tr. 115-116). Shortly thereafter, Pensgard met with the defendant and Charles Pine. Pensgard told the defendant, "I can get you money on one condition, that if the deal is not closed in the next day or so, the $8,000 has got to come back." (Tr. 117).

Pensgard then cashed two checks of $2,000 each and turned the money over to the defendant (Tr. 117-121). As he said he would, the defendant called Pensgard the next day; he told Pensgard that he would have O'Brien at Pensgard's house in two days (Tr. 121).

Two days later, the defendant, Charles Pine and Edwin O'Brien were at Pensgard's house and O'Brien asked if

the contracts were ready (Tr. 122). There were eight contracts and at O'Brien's direction four were put in Pine's name and four were put in Pensgard's name.

In exchange for signing his name to the contracts which O'Brien was purchasing, Pensgard was to receive twenty-five per cent of all the royalties to which O'Brien became entitled (Tr. 123). In addition, Pensgard was to receive, from his employer, ten per cent of the $58,000 and a ten per cent interest in the wells (Tr. 154).

The contracts were dated October 3, 1963, a day before they were signed, and were in the total amount of $58,600. O'Brien gave Pensgard a check for $58,000 and said he would like the corporation seal on the contracts (Tr. 125). Pensgard called his employer on the telephone and both Pensgard and O'Brien spoke to the employer (Tr. 126).

After speaking to the employer O'Brien took the check out of Pensgard's hand said that they would all go to Springfield the next morning and close the deal at the oil company office. Arrangements were made for the others to pick up Pensgard the next morning and fly to Springfield. Pensgard never saw O'Brien again (Tr. 127).

In March, 1964, the defendant called Pensgard and Pensgard asked where O'Brien's check for $58,600 was. The defendant said that O'Brien was out of town and when he returned the check would be delivered (Tr. 128).

During the same conversation Pensgard told the defendant that a lawyer named Harvey Powers had an opportunity to buy the Bloomington Small Business Investment Corporation for $35,000 plus all outstanding debts and that Powers needed a loan of $35,000 to complete the deal. Pensgard asked the defendant if he would be interested (Tr. 128).

Pensgard made an appointment for the defendant to meet Powers and introduced them to each other the next day in the presence of Lloyd Vincent, Powers' auditor (Tr. 129-130). Powers told those present what a good business opportunity it would be to buy the Bloomington Small Business Investment Corporation (Tr. 130). Powers said that if Pensgard could raise the $35,000 that Powers needed, Pensgard would be made the managing director of the company. Powers asked the defendant if he could raise the money and the defendant said that he would let Powers know (Tr. 131).

The defendant called Pensgard the next evening and said that he had raised $22,000, telling Pensgard that if Pensgard and the others could raise $13,000 they would have a deal (Tr. 132). Pensgard spoke to Powers and Vincent and then spoke to the defendant, telling him that Vincent had $13,000 in checks (Tr. 132).

The next day the defendant, Powers, Vincent and Pensgard met at Powers' office. Lloyd Vincent left and Powers said that he had a receipt for $13,000 on deposit with the United Bank of America for out-of-town checks which would take a few days to clear (Tr. 133). The defendant then said that he had to have some cash to hold the deal together, or else his people would back out. Powers then asked Pensgard if he could raise four or five thousand dollars as a binder and that he would get the money back the moment the $13,000 in checks cleared the bank (Tr. 134).

A day or so later Pensgard met with the defendant and Powers. The defendant presented Powers with a check for $22,000 and Powers gave the defendant a receipt for $13,000. Pensgard gave Powers $4,000 which Powers gave to the defendant along with the check for $2,000. Arrangements were made to meet the next morning at the United Bank of America to conclude the deal (Tr. 137).

Pensgard waited at the bank all morning but neither the defendant nor Powers arrived (Tr. 138). About a week later Pensgard called the defendant, told him that he knew his real name and threatened to call the federal authorities (Tr. 139-140). The defendant called him back the next day and said he was returning Pensgard's $12,000 by check in a few days (Tr. 140). Pensgard never received any of the $12,000, nor did he receive either the $58,600 check on the oil wells or any stock in the Bloomington Small Business Investment Corporation (Tr. 141-142).

Testimony of Donald Rasmussen

Donald Rasmussen identified Government Exhibit 8 as a check for $5,000 dated December 1, 1961, made out to Sinopoli Sausage Company and signed by him (Tr. 160-161). A few hours before making out the check, Rasmussen had spoken to the defendant, who told Rasmussen that he wanted to invest some money in the company but did not want Sinopoli to know that this money was being put in by the defendant. Therefore, the defendant requested that Rasmussen write the check, stating that he, the defendant, would deposit enough money to cover the check if he used it (Tr. 163).

The defendant picked up the check at Rasmussen's home (Tr. 164). Rasmussen had previously written four or five checks for the defendant (Tr. 166). On each of these instances the defendant would deposit enough money in Rasmussen's account to cover the checks (Tr. 167).

A few days later Rasmussen called the defendant and told him that no funds were deposited to his account and the defendant said he had not used the check (Tr. 168). Rasmussen stopped payment on the check (Tr. 168).

Testimony of Arnold Schneider

In December, 1961, the defendant and Mr. Sinopoli showed Arnold Schneider Government Exhibit No. 8 and Mr. Sinopoli told him that if he helped get the check cashed he would get a thousand dollars out of it (Tr. 180). Schneider had given a man named Jerry Sund $2,900 in 1959 and had been unsuccessful in getting it back. The thousand dollars Schneider was to obtain for helping cash the check was to be applied against what Sund owed him (Tr. 181).

Sinopoli, Schneider and the defendant went to the First National Bank of Cedar Lake in Indiana, where Schneider banked. Sinopoli and Schneider entered the bank; the defendant remained in the car. The cashier gave Sinopoli $5,000 (Tr. 182).

In the car, Sinopoli gave Schneider a thousand dollars. Thirteen days later the bank notified Schneider that payment had been stopped on the check (Tr. 183). Eventually Schneider paid the bank out of his own funds (Tr. 184). He did not keep the original $1,000 but gave it back to Sinopoli (Tr. 184).

Testimony of David Kurash

On June 14, 1965, Special Agent David Kurash of the Internal Revenue Service interviewed the defendant, who was present at the Internal Revenue office with an attorney (Tr. 213). Kurash told the defendant he was investigating Mr. Sinopoli (Tr. 196). Kurash asked the defendant whether he had ever received money from Sinopoli and the defendant said that he had, on one occasion (Tr. 215).

Fidanzi told Kurash that he had arranged to bring Sinopoli and Rasmussen together, that they were going into the sausage business together and that Rasmussen was paying Sinopoli a total of $50,000. The $5,000 was Fidanzi's commission for arranging the deal (Tr. 217). The defendant told Kurash that he did not know the check was not good when he cashed it (Tr. 218).

Testimony of Bernard Greenspahn

In July, 1963, Greenspahn owned an automobile agency in Harvey, Illinois (Tr. 223). The defendant, in the presence of a friend of Greenspahn's named Maurio DeAndre, told Greenspahn that he had some television sets for sale at one hundred dollars apiece Greenspahn ordered seven for himself and for his employees (Tr. 224-225). A few hours later the defendant called Greenspahn and said that he needed cash in order to obtain the sets and that he would send a friend to pick up the money and delivery would be that evening (Tr. 226).

Greenspahn collected a total of $720 which he gave to a messenger (Tr. 227). When he did not receive the sets within a week and one-half he got in touch with the defendant by telephone (Tr. 228). The defendant told Greenspahn that he would either get the televisions or his money back; the defendant said that he had received the money (Tr. 229).

Over a period of several years Greenspahn received $418 of his money back, some of which came from the defendant (Tr. 230).

Testimony of Bennie Beaird

In November, 1964, Mr. Beaird, who is in the insurance and investment business, met the defendant and Harvey Powers at O'Hare Airport (Tr. 301). The three men went to the offices of Worldwide Mortgage Company in Wheeling (Tr. 303). They then went to a restaurant where they discussed Beaird's desire to borrow $100,000 (Tr. 304-305).

The two men told Beaird that a loan of $100,000 would cost him $12,000, to which Beaird had no objection. They also told Beaird that two per cent of the $112,000 would have to be forthcoming from him before they went to work on the loan (Tr. 305).

Approximately three weeks later Beaird returned to Worldwide Mortgage and told the defendant and Powers that the payment by him of twelve per cent was "an equitable situation" but that he objected to putting up two per cent ahead of time (Tr. 306). The defendant told Beaird that there was no way for them to go to work on the loan until they had the two per cent. Beaird said that he would give it additional consideration (Tr. 307).

On December 12, 1964, Beaird turned over two checks totalling $2,240 to the defendant and Powers and consummated the application for the loan (Tr. 308-309). An interest rate of 5¾ per cent was agreed upon for the loan (Tr. 310). Government Exhibit No. 11 is a true copy of the contract for the loan (Tr. 311).

It was agreed that within sixty days the borrower would have either the loan or his money back (Tr. 312-313). Beaird never got the loan or his money back (Tr. 313). Beaird gave the check to Powers (Tr. 314). Both the defendant and Powers told him that the money would be returned after sixty days if the loan was not secured (Tr. 314).

Testimony of Donald J. Blazavier

Donald J. Blazavier was introduced to the defendant by Harvey J. Powers in the fall of 1965. He had several notes and mortgages due and approached the defendant asking for help. The defendant said he had influence with a lot of banks and could probably have Blazavier's notes extended (Tr. 338-339).

Blazavier owed about $40,000. Three weeks later, Blazavier saw the defendant and Harvey Powers at World Wide Mortgage. Blazavier asked the defendant to obtain a loan for him. The defendant said he could obtain a $50,000 loan for Blazavier, but it would cost him $5,000, to be paid to a bank official that the defendant knew (Tr. 341). Blazavier borrowed $5,000 from James Leo and Dan Viola and gave them a check for $5,500 (Tr. 342).

After cashing the check received from Leo and Viola, Blazavier gave the defendant $5,000 in cash with the understanding that if the defendant did not obtain the loan for Blazavier, the money would be returned to Blazavier (Tr. 343-344).

A week later, Blazavier asked the defendant whether the loan had been placed. The defendant indicated he had been unable to get the loan, but that the money had been given to the bank official, and the defendant was unable to get it back (Tr. 346).

Approximately three weeks later, Blazavier introduced Dan Viola to the defendant at World Wide Mortgage (Tr. 347). Blazavier was requested to leave the room. When he returned, he was given a piece of paper to sign, Government Exhibit 14, which he gave to Dan Viola (Tr. 348-350).

After Viola left, the defendant and Powers offered Blazavier a job at $150 a week salary working in the office of World Wide Mortgage (Tr. 351). Blazavier was never paid the $150 a week salary, nor the original $5,000. He never received the $50,000 loan, and he never repaid Viola his $5,000 (Tr. 352).

In July, 1965, the defendant asked Blazavier to obtain $1,500 so that the defendant could close a project in New York City (Tr. 353-354). The defendant spoke to both Blazavier's mother and wife (Tr. 355). The three of them agreed to give the defendant $1,500 (Tr. 356). Blazavier gave the defendant $1,500 for use on a project in which Blazavier could make some money and pay off his debts (Tr. 357-359).

The defendant told Blazavier that if this deal went through, Blazavier might receive between $70,000 to $90,000. The deal did not go through, and Blazavier did not receive his $1,500 back (Tr. 361).

In September of 1965, Blazavier received $800 in cash from his wife and was told to take it to the defendant at a law office in Harvey, Illinois. When Blazavier met the defendant, he asked him why he had called and visited Blazavier's wife. The defendant said that he and Powers had gone to Kenosha and told Blazavier's wife that they needed $800 (Tr. 362-363). The defendant told Blazavier that he would be part of the Harvey office and would receive profits and funds therefrom (Tr. 364). Blazavier did not become part of the office, nor did he receive the $800 back (Tr. 365).

In December of 1964, the defendant asked Blazavier to cash two checks each in the amount of $1,120, given to the defendant by Bennie Beaird. Blazavier was unable to cash the checks (Tr. 367-369).

At one time, Blazavier had the defendant call or talk to Harvey Powers in regard to Powers returning Blazavier's money to him. Blazavier and the defendant, together, tried to find out where Blazavier's money was. It is possible that Blazavier told the defendant that he was sure that Powers got Blazavier's money (Tr. 373-374).

Powers defended both Blazavier and his wife on check charges, but the $800 previously mentioned was not a legal fee for the defense of Blazavier's wife (Tr. 379-380). Blazavier's arrest on the check charge arose out of one of the defendant's checks in the amount of $5,700 (Tr. 383).

Testimony of Dan Viola

On December 5, 1964, Dan Viola met the defendant and asked him for the money which Blazavier had borrowed from Viola and James Leo and given to the defendant. The defendant asked Blazavier to leave the room and told Viola that Blazavier had interest in one of the defendant's projects and the defendant would have him assign that interest to Viola. A paper purporting to assign such an interest was signed by Blazavier and given to Viola (Tr. 414-423).

Viola never received the $5,000 back and when he went to the World Wide Mortgage office thirty days later it was vacant (Tr. 423).

Testimony of Noel Simon

In 1961 Simon was vice-president of Mid-Continent Machinery Company which distributed machinery for coin-operated dry cleaning and laundry installations. Kenneth Fabry was President (Tr. 436). In October, 1961, Simon met the defendant in the office of Ed Popovits. Also present were Mr. Popovits, Mr. Sinopoli and Mr. Hoff, a

salesman for Simon (Tr. 437-438). The defendant said that he represented a group of people who wanted to go into the coin-operated dry cleaning and laundry business (Tr. 438).

The defendant asked Simon's group to prepare a proposal setting forth what equipment would be necessary and to prepare a contract (Tr. 439). A few days later the Simon group met with the defendant, who took the group out to see a location where he was going to install the equipment (Tr. 440).

They all went back to Popovits' office to discuss the contract. The defendant then told Simon that Simon would have to come up with some front money for Mr. Sinopoli because Sinopoli was a nephew of one of the principals whom the defendant represented and Sinopoli was in dire need of funds (Tr. 441-442). The contract was to be in the neighborhood of $90,000 and Mid-Continent was to pay $9,000 for having the defendant sign the contract (Tr. 443).

Simon and Fabry met the defendant a few days later and the defendant asked them to prepare another contract and to bring the front money with them to the next meeting (Tr. 445).

A week later the defendant signed the contract and Simon gave Hoff a check for $9,000 (Tr. 446-450). The defendant told Simon that he would receive a cashier's check for $110,000 shortly in the mail (Tr. 450). Simon did not receive a check in the mail but did see the defendant a week or ten days later (Tr. 450).

The defendant showed Simon a cashier's check for $110,000 made out to Mid-Continent Machinery Company and drawn on the Mid-City National Bank. The defendant told Simon that he could take the check and conclude the

one deal or wait and make three other contracts with the defendant. Simon called Fabry and then told the defendant that he would wait for the other three deals (Tr. 451).

They then discussed the three other deals which comprised a total of $345,000. The defendant requested an additional $6,000 in front money. Simon said that he did not have $6,000 in front money to give the defendant and the defendant said that he had to have the front money before he gave Simon a check (Tr. 452).

On November 30, 1961, a meeting took place at Popovits' office at which the final three contracts were to be signed and Simon's group was to receive a check for the four deals. Simon brought to the meeting Mr. Sol Schluger, sales manager of the company which manufactured the equipment which Mid-Continent was going to sell to the defendant (Tr. 454).

Simon told the defendant that Schluger had brought the additional $6,000. Schluger asked to see the checks which the defendant was to bring and the defendant showed the $110,000 cashier's check. Schluger then proposed that the defendant give him the cashier's check and Schluger would give the defendant the $6,000 (Tr. 455).

The defendant told the group that he would sign the contracts and give them one check to cover the entire amount and that Schluger should give him the $6,000. When Schluger refused, the defendant tore up the contracts and left (Tr. 456).

Three weeks later Simon was at the defendant's home and the defendant said that he had "full intentions of returning the money . . . ". The defendant said that he had received only $2,000. Simon never received any of the money back nor did he sell the defendant any machinery (Tr. 460-461).

Testimony of Miles R. Hoff, Jr.

Hoff cashed the check for $9,000 made out by Noel Simon which was to be given to Louis Sinopoli. He gave Sinopoli $6,000 in cash and kept $3,000 as his commission for arranging the sale by Mid-Continent to the defendant. Hoff was originally to receive a commission of $9,000 for arranging the sale but Simon told him to give Sinopoli $6,000 and Simon would make it up to him on another sale (Tr. 471-478).

Hoff never gave the defendant any of the $3,000 which he got, nor did he ever see anybody else give the defendant any part of the remaining $6,000 (Tr. 481).

Testimony of Kenneth E. Fabry

Mr. Fabry corroborated the testimony of Mr. Simon with respect to the meetings with the defendant and what took place (Tr. 482-491).

Testimony of Bruce Jester

In March, 1965, Jester lived in the Shreveport, Louisiana area and was seeking employment (Tr. 524). On March 16, 1965, Jester was introduced by Francis Carnical to the defendant, Harvey Powers and John Birdsell (Tr. 526).

When Jester was alone with the defendant, Jester said that he understood that World Wide Mortgage Company was establishing offices in the area and asked to be interviewed for a job (Tr. 528). The next day the defendant interviewed Jester for a position with World Wide Mortgage (Tr. 530).

During the interview Jester told the defendant that he was indebted to the extent of $1,600 (Tr. 531). The next day the defendant told Jester that he would like to hire him but he didn't want anyone working for the company who was in debt (Tr. 533). It was agreed that Jester would begin work at $150 a week and go on commissions at a later date (Tr. 535).

A few days later the defendant told Jester that the company had some expenses which he would like to clear up. He asked Jester if Jester could cash a $10,000 check from a company in Peoria, which check represented commissions to the defendant (Tr. 537). The next day the defendant showed Jester a check that was signed but did not have the amount of money written in (Tr. 539). At the defendant's request, Jester obtained the use of a check-writer and had the $10,000 figure imprinted on it (Tr. 540-541).

The check was signed with the name Dale Runyon on an account called International Management (Tr. 541). Jester cashed the check at a bank, depositing $1,000 in the World Wide Mortgage Account, keeping $2,000 to cover his debts and expenses and giving the remaining $7,000 to the defendant (Tr. 544-546).

Later in March, 1965, the defendant told Jester that he was going to Dallas to close a loan and asked Jester to accompany him (Tr. 546-547). In Dallas Jester cashed a check for the $1,000 in the World Wide Account in the Shreveport Bank and gave it to the defendant (Tr. 549-550). Jester received $500 of this money back from the defendant, to cover certain expenses in Shreveport (Tr. 551).

Jester never received a salary check. The original $10,000 check was returned marked "insufficient funds" and no one ever supplied Jester with funds to make the check good (Tr. 553).

Testimony of George F. McNamara

Mr. McNamara is the supervisor of mutuels at Arlington Park racetrack. Government Exhibit 20 is a form which shows that the defendant won $1,347.20 on the twin double on December 17, 1963 (Tr. 591-599).

Testimony of Eugene H. Shorts

In March of 1965, Shorts and Larry Bonnet met the defendant and John Hyde, a lawyer, at a hotel near O'Hare Airport (Tr. 601-604). At dinner, the defendant agreed to lend Shorts $280,000 as a mortgage on buildings that Shorts was constructing (Tr. 604-605). The terms included a discount of $28,000 as a brokerage fee (Tr. 606). The defendant told Shorts that a good faith deposit of $5,470 would be required (Tr. 607). Two weeks later Shorts gave the defendant $5,470 in cash, and received a contract signed by Guido Fidanzi and Larry Bonnet, Government Exhibit 22 (Tr. 617-623).

A week and a half later, the defendant told Shorts that he would need an additional $5,470 to close the loan (Tr. 627). Shorts never paid the additional amount, never received the original $5,470 back and never obtained the loan (Tr. 628-632).

Testimony of John McPherson

In July, 1963, the defendant told McPherson that he was about to close a deal on the purchase of two night clubs and two houses of prostitution. The defendant said he needed $2,000 to $3,000 to close the deal and if McPherson could come up with that money, he would receive $3,000 in Profit (Tr. 659-661).

In August of 1963, McPherson gave the defendant $4,950 in cash (Tr. 663). McPherson received approximately $2,500 of his money back (Tr. 666).

In the summer of 1964, the defendant told McPherson that the Internal Revenue Service was not as interested in what he owed them in taxes as how he got his money. The defendant stated he was trying to win over $600 at the track to show a source of income (Tr. 668-669).

Testimony of Robert J. Butler

Butler is an Internal Revenue Agent (Tr. 696). In December, 1963, he interviewed the defendant, asking him certain questions about his income and the source of his income. The defendant said he would answer these questions at a later date (Tr. 699).

The defendant said that Butler was never going to prove any additional income for the defendant for 1960, 1961, and 1962 and that "the man who is going to testify that he gave me money hasn't been born yet." (Tr. 700).

In November, 1964, Butler again interviewed the defendant (Tr. 700). The defendant stated that for the two years 1961 and 1962, his taxable income should have been increased by $15,000 (Tr. 703).

Butler testified that he asked the defendant about the sources of his income and the defendant said that he did not wish to disclose these sources (Tr. 703). Defendant's motion for a mistrial was taken under advisement (Tr. 704-707).

Butler then summarized his calculations with respect to the defendant's tax liabilities based on the testimony he had heard during the trial (Tr. 716-728).

The defendant rested without putting in any evidence.

REASON RELIED ON FOR GRANTING THE WRIT

1. The Attack Of The Prosecutor Upon The Character Of The Defendant In His Opening And Closing Statements When The Character Of The Defendant Was Not In Issue Was So Prejudicial And So Improper That The Court Erred In Not Declaring A Mistrial.

The defendant was indicted for income tax evasion and for failure to file income tax returns. These were the *only* charges in the indictment. These were the charges which the jury was to determine.

In his opening statement the prosecutor told the jury that the defendant obtained his income from:

> " . . . swindling, extortion and from confidence games." (Tr. 3).

The defendant's motion for a mistrial was denied. The prosecutor said he would show:

> " . . . how the defendant obtained this money by extortion or confidence games, . . . " (Tr. 4).

In the opening portion of his closing argument the prosecutor argued as follows to the jury:

> "You have heard over the last few days a rather sordid story of how one makes a living.
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> You have heard one gyps, cheats, swindles, extorts to make a living.
>
> You have seen how he does it, you have seen the lives that have been destroyed—" (Tr. 806).

The defendant's motion for a mistrial was denied. A short time later the prosecutor spoke of the defendant as follows:

> "That is his business, to extort, to scare people, to intimidate people, and take money from them, to destroy them and take money from them." (Tr. 810).

The defendant's motion for a mistrial was denied.

Further reference was made in the opening section of the prosecutor's closing argument to "swindling income by the defendant" (Tr. 812); to "Pensgard swindled again," (Tr. 815); to a "Beautiful swindle" (Tr. 816); to "Schneider had been bilked by the defendant" (Tr. 817); to "the Schneider fraud" (Tr. 819); to "The Mid-Continent transaction was the sale of the dry cleaning equipment, a beautiful swindle." (Tr. 824).

The prosecutor then told the jury:

> "Now, the defendant has committed what you have seen, perhaps other offenses which have led him to this source of income, . . . " (Tr. 830).

He followed that with:

> "In additional to stealing from these victims who have testified, he has tried to steal from the United States by not paying taxes or filing returns." (Tr. 830).

The torrent goes on:

> "He has defrauded everybody, and now he is trying it again, . . . " (Tr. 831).

and on:

> "Ladies and gentlemen, just like people who work in banks, who work as salesmen, as teachers, auto mechanics, chauffeurs, this defendant worked as an extortionist, as a swindler, as a con man." (Tr. 835).

and on:

> "He tried to swindle you, the Government, the people as well. You can swindle him, swindle him, swindle him — that's his life; that's how he makes it." (Tr. 835-836).

And concludes with a final characterization, aimed at unfairly influencing the jury:

> " . . . Guido Fidanzi, swindler and con man . . . " (Tr. 836).

So afraid was he that the facts themselves would not carry the day, the prosecutor found it necessary to characterize each of the government witnesses. These characterizations were designed to curry favor with the jury and cause antipathy towards the defendant:

> "Poor Mr. Goetz." (Tr. 809).
> " . . . poor Mr. Pensgard . . . " (Tr. 814).
> "Poor Pensgard." (Tr. 815).
> " . . . poor Mr. Pensgard . . . " (Tr. 815).
> "Poor Mr. Pensgard . . . " (Tr. 815).
> " . . . poor Mr. Blazavier . . . " (Tr. 824).
> "Bruce Jester . . . that poor boy looking for a job, . . . " (Tr. 825).
> " . . . poor Mr. Jester . . . " (Tr. 826).
> "Poor Mr. Shorts." (Tr. 828).

The government had the right to introduce evidence of the actual transactions so that it could show income to the defendant — to that, the defendant does not object. But what is objectionable and what did make it impossible for the defendant to obtain a fair trial was the constant characterization of these transactions in a manner calculated

to arouse the passions of the jury so that they would convict the defendant of crimes for which he was not on trial.*

In *Greer* v. *United States,* 245 U.S. 469, 471-472 (1918); Justice Holmes pointed out that if the character of the defendant were regarded as necessarily material to the main issues, " . . . the government would be entitled to put in evidence whether the prisoner did so or not." But since the government may not make an issue of the defendant's character unless the defendant introduces the issue, Holmes concluded that, "The meaning must be that character is not an issue unless the prisoner chooses to make it one; . . . "

In the present case the prosecutor painted the character of the defendant as a con man, swindler and extortionist when he was not on trial for con game, swindling or extortion. Receipt of income, not *how* the defendant received the income was the sole *proper* issue in the case.

The impropriety of the prosecutor's statements in the instant case is analogous to the actions condemned by the Supreme Court in *Viereck* v. *United States,* 318 U.S. 236, 247 (1942). Viereck was indicted for willfully omitting to state material facts required to be stated in a supplemental registration statement filed by him with the Secretary of State. The prosecutor's closing statement was a naked appeal to the most understandable and most easily

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* Interestingly enough, the defendant was acquitted by a jury in the proper forum, the Circuit Court of Cook County, when he was tried for his dealings with the government witness Redmon. The acquittal came in *State of Illinois* v. *Guido Fidanzi,* #66-957, on August 19, 1968, in the courtroom of Judge Louis Wexler.

aroused emotion — patriotism.* Of this argument Chief Justice Stone said:

> "In his closing remarks to the jury he indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice."
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> * * *
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> "At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted." *Viereck* v. *United States,* 318 U.S. 236, 247-248 (1942).

Justice Jackson elaborated on this theme in *Michaelson* v. *United States,* 335 U.S. 469, 475-476 (1948), saying:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presump-

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* The prosecutor's exact words were:

"In closing, let me remind you, ladies and gentlemen, that this is war. This is war, harsh, cruel, murderous war. There are those who, right at this very moment, are plotting your death and my death; plotting our death and the death of our families because we have committed no other crime than that we do not agree with their ideas of persecution and concentration camps.

"This is war. It is a fight to the death. The American people are relying upon you ladies and gentlemen for their protection against this sort of crime, just as much as they are relying upon the protection of the men who man the guns at Bataan Peninsula, and everywhere else. They are relying upon you ladies and gentlemen for their protection. We are at war. You have a duty to perform here.

"As a representative of your Government I am calling upon every one of you to do your duty."

tion of good character, *Greer* v. *United States*, 245 U.S. 559, 62 L. Ed. 469, 38 S. Ct. 209, but it simply closes the whole matter of character, disposition and reputation on the prosecutor's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so ever persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

In his dissent in *Michaelson* Justice Murphy reached the same conclusion with respect to the place the character of the defendant has in the trial of a criminal case:

"The common law has not grown in the tradition of convicting a man and sending him to prison because he is generally a bad man or generally regarded as one. General bad character, much less general bad reputation, has not yet become a criminal offense in our scheme. Our whole tradition is that a man can be punished by criminal sanctions only for specific acts defined beforehand to be criminal, not for general misconduct or bearing a reputation for such misconduct.

"That tradition lies at the heart of our criminal process. And it is the foundation of the rule of evidence which denies to the prosecution the right to show generally or by specific details that a defendant bears a bad general estimate in his community. In the light of our fundamental conceptions of crime and of the criminal process, there is nothing anomalous

> in this exclusion. It is designed to restrain proof to the limits of the charge and to prevent conviction for one offense because perhaps others, or misconduct not amounting to crime at all, have been perpetrated or are reputed generally to lie at the defendant's door."

In *United States* v. *Bufalino,* 285 F.2d 408, 419 (2nd Cir. 1960), Chief Judge Lumbard succinctly summarized this important aspect of our legal heritage. In doing so he shows us what is so repugnant about the prosecutor's language, approach and tactics in the instant case:

> "The administration of our system of criminal justice and our basic concepts of fair dealing are centered on the requirement that in each case we reach a result based solely on the charges made in the particular indictment and on the evidence which appears on the record with regard to those charges."

See also *United States* v. *Accardo,* 298 F.2d 133, 141 (7th Cir. 1962), concurring opinion of Judge Duffy.

The prosecutor ignored the charges in the indictment during a portion of his closing argument to concentrate his fire on the character of the defendant. His attack was intentional and pervasive, and must be dealt with accordingly.

> "Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." *Berger* v. *United States,* 295 U.S. 78, 89 (1935).

In *Berger* the court suggested that the judge should declare a mistrial in a situation where other judicial action cannot correct the situation.

> "But the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken." (P. 85).

Vile and corrupt as the prosecutor may think the defendant, nevertheless, the defendant is entitled to a fair trial; and it is the prosecutor's duty to ensure him that fair trial.

CONCLUSION

For the foregoing reasons, we pray that the Petition for Certiorari be granted and that this court either remand the cause to the Court of Appeals for the Seventh Circuit for a consideration of the point set out herein, or that this court note the errors and make known its ruling thereon.

Respectfully submitted,

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